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FAILURE OF LEGISLATURE TO ENACT SUITABLE CRIMINAL LAWS

The case of *People v. Tompkins*, 79 Northeastern 326, Court of Appeals of New York, forcibly illustrates a weakness in the governmental system of that State which seems to amount to a failure of justice. The same result might equally well occur in any of our States, so that the trouble is not peculiar to any individual State. The defendant represented himself as an agent of a telegraph company, by reason of which position he was able to acquire advance information on the results of certain horse races, before the news was given out to the public. He induced the complainant to bet $50,000 on a certain horse, named by the defendant as the winner, but the information was entirely false, so that complainant lost the entire amount to the defendant and his confederates. The defendant was prosecuted on a charge of larceny by false pretences and convicted, but a motion in arrest of judgment was granted on the ground that the conviction was contrary to previous decisions of the New York courts. Whatever may have been the decision of the State courts, it seems clear that the defendant was guilty of such fraud as to be punishable on the grounds of public policy, and the weight of authority is in support of this view.

The court in affirming the motion in arrest, although admitting the soundness of the argument of the District Attorney for reversal, concluded that the law was settled in 1871 by *McCord v. People*, 46 N. Y., 470, and that it felt obliged to follow the precedent. In that case, one who fraudulently represented himself as an officer of the law and as having a warrant for the arrest of a person, induced him to give up valuable property, thus to avoid imprisonment. It was held that, although the motive of the appellant was fraudulent, yet the complainant had parted with his property for an illegal purpose and the design of the statute was to protect those who for *honest purposes only* were induced by false representations to give up their goods, and not to protect those whose object was unworthy or illegal. This was merely an affirmation of a decision handed down in 1837—*People v. Clough*, 4 Barb., in which case the reason of the rule was questioned, and the result was admitted to be within the words of the statute, but hardly within the spirit. The court there said, "Does one who feeds a beggar, instead of ordering him from the house, participate in the crime of vagrancy?"

In the McCord case, *supra*, Peckham, J., framed an able dissenting opinion, stating that the statute was to be construed not solely for the benefit of the party defrauded, but to punish a public offence and to prevent fraud; that the illegal motive of the party defrauded was secondary to and would not discharge the offence committed by the one falsely obtaining the property. It was clearly shown that where both parties to a civil suit are equally guilty of a felony, out of which the action arises, the law refuses its aid to either, but leaves them where it finds them. But this rule has no application whatever to criminal proceedings, because the party defrauded is no party to the action. The reason of the rule fails since the people are prosecuting a public offence.

It is interesting to note that in 1900, in *People v. Livingston*, 47 Appel. Div., 284, the court said: "We venture to suggest that it might be wise for the Legislature to alter the rule laid down in *McCord v. People*. If the rule as to larceny, by false pretences and by trick or device, were made the same as the common law rule, that stealing property from a thief is the same crime as stealing from a true owner, we think this class of cases might be much more successfully dealt with."

The result of our observation up to this point is a decision in 1837 which is admittedly enforcing the letter and not the spirit of the statute; an affirmation of that doctrine in 1871, with a very strong dissenting opinion; in 1900 a pointed suggestion by the highest Court of the State to the Legislature that the law would

be more serviceable and successful if modified; in 1906 an opinion which protects the criminal and allows him to go unmolested, because the statute has previously been adjudged inadequate to meet his case, and the respect due to former decisions will not permit a change.

The court said, "Although it may be admitted that the rule which exists only in New York and Wisconsin is at variance with what now appears to be the more reasonable view adopted in at least twelve of our sister States, and although it may be conceded to be too narrow for the practical administration of criminal justice as applied to modern conditions, we are admonished that the remedy is not with the courts, but in the legislature. We cannot change the existing rule without enacting, in effect, an *ex pos. facto* law. This cannot be done without ignoring the constitutional rights of many who may legally claim the protection of the rule. Neither can it be done without judicial usurpation of legislative power."

In other States, there are several decisions which hold that the right of the State to prosecute is not barred by the fact that the motive of the person defrauded was illegal, the illegal act constituting him *particeps criminis*. *People v. Martin*, 102 Cal. 558; *In re Cummins*, 16 Colo. 451; *Casily v. State*, 32 Ind. 62; *State v. Walton*, 114 N. C. 783.

The opinion of the court in the case under review leads us to a consideration of the doctrine of *stare decisis*. The inadequacy of the statute as passed by the legislature had been judicially admitted, but no remedial action had been taken by the law-making body. Judge Cooley, in his work on Constitutional Limitations, states that the legislature and judiciary are co-ordinate departments of the government and each is of equal dignity, within its own sphere; the courts sit to enforce the legislative will, and only when they find that the legislature has failed to keep within its constitutional limits, are they at liberty to exercise the extremely delicate function of disregarding its action.

In the principal case there are no grounds upon which the enactment could be declared void, for no constitutional point was involved; the legislature had merely failed to enact measures under which a by no means small class of criminals could be prosecuted. If it is the duty of courts to enforce the legislative will, the holding in this case is on principle impregnable, but the fact still remains that either the reluctance of the Legislature is a desire not to punish this class of lawbreakers, or the courts should be allowed to adapt the law to the exigencies of the times. It

would be presumptuous for us to say that the court should have overthrown the doctrine *stare decisis*, which, though repeatedly attacked, has nevertheless become a very powerful factor in the decisions of all courts. Indeed, the principle has had a remarkable restraining influence on the ever-present impulse and desire to change. It will be remembered that the statute had been in existence for nearly seventy years and was admittedly unfit to reach the varieties of swindling operations which that period of time had produced.

Nevertheless, the courts felt unable to adopt a modern rule which would be sufficient for modern demands, and the result is that this class of criminal cannot be punished until the Legislature is disposed to enact sufficient measures to cover the crime.

LAWS REGULATING HOURS OF LABOR OF MINORS AND WOMEN. CONSTITUTIONALITY

One can scarcely conceive of the extent to which the ever growing spirit of commercialism has stealthily pervaded the various institutions of our country. Struggling humanity, weak and helpless before the sordid desire of the few to gain at the expense of the many, has voiced its own protection through the law-making powers of several States. Moved by the desire for the welfare, comfort and health of the community—for surely a State legislature could be impelled by no smaller motive in such cases—acts have been passed, by virtue of the police power in them vested, regulating hours of employment of minors and women. And it must come with no small sense of surprise and regret to the many—surprise at the heartless attitude of the court in such matters, regret because of their fruitless effort to secure a little longer lease of life—that the highest court of our leading State should declare a law regulating the hours of labor of minors and women, to be an attempt "to arbitrarily prevent an adult female citizen from working at any time of the day that suits her," and "an infringement on her constitutional liberty to contract." In enacting such laws, legislatures are moved by no mawkish maudlin sentiment, nor do they wish to arbitrarily interfere with individual rights, or make unjust discriminations. Their desire is to protect the health and safety not only of the weaker citizens of the state but also of the unborn generations and the court of greatest dignity of such a State should, indeed, be slow to attribute to such action a motive less commendable, and to condemn as unconstitutional so salutary a measure.

In the recent case of *People v. Williams*, 81 N. E. (N. Y.) 778,